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No. 93-1825

IN THE SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1993

BLACK HILLS INSTITUTE OF GEOLOGICAL RESEARCH and BLACK HILLS MUSEUM OF NATURAL HISTORY FOUNDATION, INC.,

PETITIONERS

vs.

THE UNITED STATES OF AMERICA DEPARTMENT OF JUSTICE,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT

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A. **Fossils Are Not Locatable Minerals.**

The government suggests that fossils "are no less 'land' than other mineral deposits." This comment, perhaps more than any other statement found in any document in this action, illustrates just how wide of the mark the government's understanding is of this matter.

A 1986 Memorandum to the Director of the Bureau of Land Management discusses at length the error in characterizing fossils as minerals. The author notes:

> A fossil is currently defined to be: 'any remains, impression, or trace of an animal or plant of past geologic ages that have been preserved in the earth's crust. Thrush, A Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior, Bureau of Mines (1968). The Department first ruled that fossils are not locatable as a 'valuable mineral' under the Mining Law of 1872, 30 U.S.C. § 22 et seq., in the early case of Earl Douglass, 44 L.D. 325, rehearing denied, 44 L.D. 326 (1915).

Moreover, the Memorandum also notes that the Douglass decision has stood for over 70 years and is widely recognized as the Department's position on the locatability of fossils under the Mining Law. See United States v. Bolinder, 83 I.D. 609, 28 IBLA 187 (1976); 1 American Law of Mining, § 8.01 [3] (2d ed. 1984); Reeves, The Meaning of the Word "Minerals," 54 N. Dakota L. Rev. 419, 476 (1978). It makes no sense for the United States to abandon this long held characterization of fossils and now suggest that "[f]ossils, then, are no less 'land' than other mineral deposits.

Likewise, the government's bold assertion that fossils are "analogous to other naturally occurring resources constitutive of land" also falls wide of the mark. This Court's decision in Watt v. Western Nuclear, Inc., 462 U.S. 36

(1983) provides guidance on this point. This Court recognized that:

> 'the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom,' and if all lands were considered 'minerals,' 'the owner of the surface estate would be left with nothing."

462 U.S. at 43 (quoting Northern Pacific R. Co. v. Soderberg, 188 U.S. 526, 530 (1903)). Such a broad view of what is included in a mineral reservation, which would clearly include fossils, was rejected by this Court. Id. Rather, this Court stated that for a substance to be a reserved mineral "it must not only be a mineral within one of the more familiar definitions of that term . . . but also the type of mineral that Congress intended to reserve to the United States." Id.

The Institute has contended that the fossil in this case was unregulated

personal property which Maurice Williams was free to sell to whomever he chose. If that were not the case, then the labyrinth of regulations governing minerals and timber, as well as oil and gas on Indian reservations would be superfluous. The government's characterization of the fossil as a mineral only serves to illustrate the correctness of the Institute's analysis.

B. The Institute Enjoys a Constitutionally Protected Interest in the Fossil.

It is surprising that the Solicitor General would put his imprimatur on the way in which the government has seized this fossil. Instead of affording the Institute the same process due murderers, rapists, and drug dealers, the government blithely condones forfeiture by search warrant.

It is, however, clear that the Institute has constitutionally protected rights in the fossil. First of all, the Institute had a possessory interest in the fossil. If the government can permanently deprive the Institute of its possessory interest in the fossil by merely issuing a search warrant, then no American can be assured of his or her right to retain possession of their personal property if the government chooses to seize it.

The Institute has other interests in the fossil. One such interest was the interest in preserving the fossil and studying it. The Eighth Circuit concluded that such an interest was sufficient to support the Institute's claim for return of the fossil based on the federal court's "anomalous jurisdiction." Black Hills Institute of Geological Research v. United

States, 967 F.2d 1237, 1240 (8th Cir. 1992).

The Institute was also deprived of the same rights deprived of the Petitioner in United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993). Those interests include the "valuable rights of ownership, including the right of sale, the right of occupancy, the right to unrestricted use and enjoyment, and the right to receive rents. All that the seizure left him, by the Government's own admission, was the right to bring a claim for the return of title at some unscheduled future hearing." Id. The Institute's rights, on the other hand, were limited to an action under Fed. R. Crim. P. 41(e) and the underlying action based on anomalous jurisdiction. Neither action is a satisfactory substitute for a pre-deprivation hearing.

The Institute has yet another interest in the fossil. That interest includes the right to assert a possessory lien for the value of the services the Institute has thus far rendered in restoring the fossil. Uncontradicted evidence shows that the Institute has devoted more than 5,000 hours to restoring the fossil and has spent over $100,000 in the process. The way in which the government seized the fossil has deprived the Institute of its right to assert a possessory lien.

CONCLUSION

For all of the reasons discussed in the Institute's Petition, as well as for those additional reasons discussed in this Reply, the Institute prays that the Court grant a Writ of Certiorari and hear the Institute's claim on its merits.

Dated this 19th day of July, 1994.

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